Extendicare Health Services, Inc. d/b/a Arbors at New Castle *and* United Food and Commercial Workers International Union, Local 27, Professional Health Care Division. Case 4–RC–21062

June 30, 2006

DECISION AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

The National Labor Relations Board, by a three-member panel, has considered both an objection and determinative challenges in an election held September 22, 2005, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 22 votes for and 19 against the Petitioner, with 3 determinative challenged ballots.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision.

The Employer operates a long-term nursing care facility in New Castle, Delaware. The Board election was conducted in a unit of nonlicensed service and maintenance employees, most, but not all, of whom are certified nursing assistants (CNAs). As stated above, the Petitioner received a majority of the votes, by a tally of 22 to 19.

There were three determinative challenged ballots. One of them, the ballot of employee Teresa Waldridge, was resolved by stipulation prior to the hearing in favor of Waldridge's eligibility to vote. The hearing officer sustained the second ballot challenge, concluding that employee Ayub Ndgiri was ineligible to vote because the parties had agreed to exclude his job classification from the voting unit. The hearing officer chose not to resolve the third challenged ballot, that of Lorraine Gibson, whom the Petitioner asserted was a statutory supervisor.

In addition, the Employer filed an objection alleging that the Board agent's late opening of the election polls resulted in the possible disenfranchisement of five eligible employees who did not vote. The hearing officer found merit in this objection, and because the ballots of these five employees would have been determinative if they had voted, he recommended that a new election be conducted.

We disagree with the hearing officer's disposition of the objection and the challenged ballots of Ndgiri and Gibson. Accordingly, we will reverse his findings on all three matters, and remand this proceeding to the Regional Director to open and count the three determinative challenged ballots in the election.

I. THE OBJECTION: LATE OPENING OF THE POLLS

As we will explain, the hearing officer here failed to appreciate the significance of the parties' factual stipulation regarding the late opening of the polls, as well as additional evidence consistent with it, considered in light of our precedent.

A. Factual and Procedural Background

The parties agreed to the following stipulation just prior to the hearing:

> 1. The polls for the representation election in the above-captioned case were scheduled to be open from 6:00 AM to 7:30 AM and from 2:00 PM to 3:30 PM on Thursday, September 22, 2005. [The] Board Agent ... arrived at the polling site at 6:05 AM and opened the polls at 6:16 AM
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> 2. The following five employees appearing on the *Excelsior* list did not appear at the polls at any time during the scheduled polling hours and did not vote in the election: Sheila Clark, Olivia Connor, Taiya Johnson, LaTyra Jones and Stella Rogers.

The five named employees did not testify at the hearing. Based on documentary evidence and the testimony of Leigh Weber, the chief administrator of the Employer's facility, the hearing officer found that on the day of the election, employee Clark clocked in at 6:42 a.m.; employee Connor called in sick and did not work; employee Jones was not scheduled to, and did not, work; employee Johnson clocked in at 9:18 a.m.; and employee Rogers had been on long-term sick leave for 2 years.[1]

The hearing officer found that, in an election decided by three votes, the additional ballots of the five nonvoting employees would have been determinative. He further found that it had not been proved that any of the five could not possibly have been prevented from voting by the delayed opening of the polls. Thus, in the hearing officer's view, the evidence did not affirmatively establish the whereabouts of the five employees during the critical 16 minutes, and accordingly, each *could* have gone to the polling site during that time and been prevented from voting because the polls were closed. Citing *Pea Ridge Iron Ore Co*., 335 NLRB 161 (2001), he sustained the objection and recommended a new election.

[1] The hearing officer found that Rogers was an eligible voter, following *Red Arrow Freight Lines*, 278 NLRB 965 (1986). There are no exceptions to this finding.

B. Analysis

In *Pea Ridge Iron Ore Co.*, supra, the Board held in relevant part that

> [w]hen election polls are not opened at their scheduled times, the proper standard for determining whether a new election should be held is whether *the number of employees possibly disenfranchised thereby* is sufficient to affect the election outcome, not whether those voters, or any voters at all, were actually disenfranchised.

335 NLRB at 161 (emphasis added). The Board explained that the standard is objective and takes no account of subjective, after-the-fact statements regarding why an eligible employee did not vote. Id.

The parties' stipulation here establishes affirmatively that the five nonvoting employees "did not appear at the polls at any time during the scheduled polling hours." This necessarily includes the 16 minutes when the polls were *scheduled* to be open but were not. In other words, the parties agreed that none of these employees arrived unnoticed during the relevant period, found the polls closed, and departed unable to vote.[2]

The hearing officer's findings concerning the whereabouts of each of the five employees are consistent with the stipulation. Thus, Clark and Johnson clocked in for work after the 16-minute delay occurred, and Connor, Jones, and Rogers did not work at all on September 22. Objectively, then, this evidence, in combination with the parties' stipulation, establishes that the five employees could not possibly have been disenfranchised by the delayed opening of the poll, consistent with the *Pea Ridge* standard.

In its brief opposing the Petitioner's exceptions, the Employer contends that the stipulation is ambiguous, and that the parties never intended to stipulate that the five employees did not appear at the polls during the 16-minute period. However, the Employer's references to the "parties' intentions" are not based on any record evidence. More significantly, the Employer's explanation does not account for the fact that the stipulation's language—that the employees "did not appear at the polls *at any time during the scheduled polling hours*" (emphasis added)—unequivocally includes the 16 minutes when polling was scheduled, but delayed.

"[I]t is generally accepted that a stipulation is conclusive on the party making it and prohibits any further dispute of the stipulated fact by that party or use of any evidence to disprove or contradict it." *Kroger Co.*, 211 NLRB 363, 364 (1974) (footnote citation omitted).[3] The Board's strict standard is due, at least in part, to the parties' choice to forgo offering evidence at the hearing in favor of reliance on the stipulation. Id. at 364. Here, neither party called any of the five employees at issue to testify concerning his or her whereabouts between 6 and 6:16 a.m. on September 22.

Accordingly, in light of the parties' stipulation,[4] as well as the additional evidence consistent with it, we overrule the Employer's objection.

II. THE CHALLENGED BALLOTS: ELIGIBILITY OF GIBSON AND NDGIRI

In their Stipulated Election Agreement, the parties agreed to a unit of

> all full-time and regular part-time non-licensed service and maintenance employees, including Certified Nursing Assistants (CNA), activities employees and maintenance employees employed by the Employer at its New Castle, Delaware (Arbors at New Castle) facility, excluding all other employees, including office clerical employees, confidential employees, contracted employees (dietary and housekeeping), Registered Nurses (RN), Licensed Practical Nurses (LPN), guards and supervisors as defined in the Act.

For the reasons that follow, we find that employees Gibson and Ndgiri should be included in the unit and their ballots counted.

A. Employee Gibson

The Board agent challenged Gibson's ballot because her name was not on the eligibility list. At the hearing, the Petitioner contended that Gibson, classified as a "supply clerk," was an ineligible statutory supervisor in light of her authority to schedule employees for work. The hearing officer rejected this position, without analysis, but chose not to further evaluate Gibson's eligibility. He recommended that she be allowed to vote subject to challenge in a new election to be conducted pursuant to his sustention of the Employer's objection above.

In light of our overruling of the Employer's objection, we disagree with the hearing officer's choice to defer ruling on Gibson's eligibility. In turn, we conclude that

[2] Compare *Wolverine Dispatch, Inc.*, 321 NLRB 796, 796-797 (1996) (election set aside because Board concluded that it was possible in the circumstances that a determinative number of eligible voters had arrived unnoticed at the closed polling area and then left without voting).

[3] See also *Woodland Clinic*, 331 NLRB 735, 741 (2000); *Lott's Electric Co.*, 293 NLRB 297, 297 fn. 1 (1989), enfd. mem. 891 F.2d 282 (3d Cir. 1989) (asserted inexperience of counsel insufficient to set aside stipulation); *Interstate Material Corp.*, 290 NLRB 362, 366 (1988), enfd. mem. 902 F.2d 37 (7th Cir. 1990) (asserted incorrectness of stipulation insufficient to set it aside).

[4] See *Woodland Clinic*, supra at 741.

Gibson is not a statutory supervisor and that she is included in the unit.

1. Factual background

Chief Administrator Weber supplied the following relevant evidence concerning Gibson at the hearing.

The Employer's facility is divided into two patient-care areas: North and South. Gibson works in the South area. She holds a CNA certification. She currently is classified as a supply clerk, although for payroll purposes she is categorized as a CNA. Her salary is in the mid-range of the Employer's CNA wage scale.

Gibson's duties as a supply clerk are to order, stock, and distribute nonprescription supplies used in patient care. She has her own desk, located in the supply room in the South area. Gibson also fills out the biweekly staffing schedule for CNAs, LPNs, and registered nurses. Administrator Weber herself makes the substantive staffing determinations; she then provides them to Gibson for completion of the schedule. The completed schedule is posted near the timeclock. Gibson also gathers information from the employees on prospective absences and availabilities, which she passes on to Weber for Weber's staffing determinations. Gibson spends 25 percent of her time on these staffing matters. When engaged in her supply-clerk duties, Gibson is supervised by the director of nursing.

Gibson also performs some patient-care work on a daily basis, although, unlike the CNAs, she is not given a specific patient assignment. When necessary, she takes a shift for an absent CNA, and then she is assigned to a specific patient. When Gibson works in patient care, she is supervised by a charge nurse.

The record thus establishes that Gibson's overall duties involve regular interaction with unit employees.

2. Supervisory status

We will assume that, by contending that Gibson's scheduling duties are supervisory, the Petitioner asserts that she has authority to "assign" employees within the meaning of Section 2(11) of the Act, which defines supervisory status. It was the Petitioner's burden to prove that Gibson exercises such authority with the use of independent judgment in order to establish statutory supervisory status.[5]

It is apparent that Gibson simply relays information to, and receives staffing decisions from, Weber, and she then records Weber's decisions on the work schedule for posting. There is no evidence that she exercises independent judgment in this process. Accordingly, the Petitioner did not establish that Gibson's role in the scheduling of staff is supervisory, and she cannot be excluded from the unit on that basis.

3. Inclusion in the stipulated unit

The question remains whether Gibson, as a non-supervisory employee, is properly includible in the unit stipulated by the parties. Her classification, supply clerk, is not expressly included in the unit.

To determine whether a challenged voter properly is included in a stipulated bargaining unit, the Board applies the three-part test set forth in *Caesar's Tahoe*, 337 NLRB 1096 (2002). Under this standard,

> the Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

Id. at 1097.

In *Los Angeles Water & Power Employees Assn.*, 340 NLRB 1232 (2003), the Board, following *Caesar's Tahoe*, supra, found a stipulated-unit agreement similar to the one here ambiguous with regard to a job classification not expressly included:

> The unit description begins with "all full-time and regular part-time employees." The next word is "including," followed by a list of job classifications. It is unclear whether those words were intended to limit the prior word "all." The final phrase "excluding all other employees" might suggest that the word "all" refers only to employees within the listed classifications. However, the matter is not wholly free from doubt.

340 NLRB at 1235–1236 (footnote citation omitted). In this case, the unit description begins with "all full-time and regular part-time non-licensed service and maintenance employees," then expressly includes certain classifications, and excludes "all other employees. . . ." As in *Los Angeles Water & Power*, we find that the parties' intent concerning Gibson's unit status, based on the language of the agreement alone, "is not wholly free from doubt." In light of the agreement's ambiguity, and the absence of extrinsic evidence of the parties' intent, her eligibility must be determined under the community-of-interest standard. *Caesar's Tahoe*, 337 NLRB at 1097.

[5] See, e.g., *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712, 713 (2001).

We conclude that Gibson's supply-clerk duties are tantamount to those of a "plant clerical" employee. The standard for identifying "plant clericals," distinct from "office clerical" employees, is "whether the employees' principal functions and duties relate to the production process, as distinguished from general office operations."[6] Moreover, an employee performing service-related duties consistent with the "plant clerical" concept is includible in a unit of service and maintenance employees with whom she interacts.[7]

Like most of the unit employees in the present case, Gibson has a CNA certification. In the course of her duties as the supply clerk, she works in the patient-care area and engages directly with the CNAs and other employees involved in patient care. Her supply work is in support of patient care. She also performs CNA work herself on a daily basis, and fills in for absent CNAs. It is apparent, therefore, that Gibson primarily is a "plant clerical" who also regularly performs CNA work. She has a substantial community of interest with the employees in the service and maintenance unit. She is therefore includible in the unit, and we will direct that her ballot be opened and counted.[8]

B. Employee Ndgiri

The Petitioner challenged Ndgiri's ballot because, at the time of the election, he was classified as a "graduate practical nurse" (GPN). The hearing officer sustained the challenge, finding that Ndgiri's wages and work as a GPN were equivalent to an LPN's, and, because LPNs were excluded from the unit, the parties intended to exclude GPNs as well.

We disagree with this analysis. Ndgiri's job classification, GPN, is not expressly included in the unit stipulated by the parties. Consistent with our analysis concerning employee Gibson, we find that the Stipulated Election Agreement is ambiguous concerning Ndgiri's unit status.[9] In the absence of extrinsic evidence revealing the parties' intent, we will apply the community-of-interest standard to determine his eligibility.[10] Under that standard, as we explain, Ndgiri is eligible.

1. Factual background

Prior to August 25, Ndgiri worked for the Employer as a CNA. On that date, having graduated from nursing school, he began work as a "graduate practical nurse," i.e., a GPN. This classification identifies an employee holding a 90-day permit issued by the state of Delaware; the permit allows him to perform many of the duties of an LPN pending successful completion of the LPN licensing exam. During the 90-day period, the GPN is paid the same salary as an LPN; in Ndgiri's case, this doubled the wages he made as a CNA. If a GPN passes the licensing test, he becomes an LPN. If he fails the test, or if his permit expires, his GPN status ceases and he is returned to his previous classification. The record establishes that at least one of the Employer's GPNs, Sean Futch, failed the test and returned to his CNA duties.

Ndgiri was a GPN on September 22, the day of the election. On October 20, he passed the licensing exam and became an LPN.

2. Analysis

We find that Ndgiri's situation is analogous to the situation addressed by the Board in *Mrs. Baird's Bakeries*, 323 NLRB 607 (1997).

There, an employee whose challenged ballot was determinative had been transferred out of a unit of drivers to work in a nondriver position, pending disposition of a driving-while-intoxicated charge. He was in this nondriver status at the time of the election in the drivers' unit. Some evidence indicated that it was a permanent transfer; for example, the employer had filed a "change of status" form for the transferred driver. Other evidence indicated that the transfer was temporary; thus, the driver retained his pay grade. The record also showed that the employer had a past practice of temporarily transferring drivers until DWI charges could be adjudicated. Reversing the hearing officer, the Board concluded that the employee's nondriving position was temporary, that he had a reasonable expectation of returning to the drivers' unit, and therefore that he was an eligible voter.

Here, the GPN classification is temporary by definition; the job lasts no longer than the 90-day GPN permit. At the time of the election, Ndgiri was in the middle of the 90-day term—neither working as a CNA nor licensed as an LPN. In essence, Ndgiri was given a short-term transfer pending clarification of his permanent status. Thus, although there is some suggestion of a permanent transfer here (for example, the payment of LPN wages to

[6] Id. at 1098.

[7] See, e.g., *Garner Aviation Service Corp.*, 111 NLRB 191, 192–193 (1955).

[8] The hearing officer hesitated to determine Gibson's eligibility at least in part because of a perceived credibility conflict. Thus, witness Comforti Nwakaiha, a CNA, testified that she had never seen Gibson perform patient-care work. This appears to be inconsistent with Weber's testimony concerning Gibson's duties. However, Nwakaiha had been employed for only 6 months at the time of the hearing. Moreover, she was assigned to the North patient-care area, while Gibson worked in the South area. Thus, giving Nwakaiha's testimony appropriate weight, Weber's testimony regarding Gibson's patient-care work does not appear to be significantly disputed. In any event, in light of Gibson's primary duties as a supply clerk, it is apparent that she is an includible "plant clerical" regardless of her limited CNA work.

[9] *Los Angeles Water & Power Employees Assn.*, supra at 1235-1236.

[10] *Caesar's Tahoe*, supra at 1097.

Ndgiri), given the overall weight of the evidence, we find that, at the time of the election, he had a reasonable expectation of returning to the unit.

We accordingly conclude that Ndgiri was a temporary transfer, that he retained a strong community of interest with the other unit employees, and that he was an eligible voter.[11]

DIRECTION

IT IS DIRECTED that the Regional Director for Region 4 shall, within 14 days of the date of this Decision and Direction, open and count the ballots of Teresa Waldridge, Lorraine Gibson, and Ayub Ndgiri. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

Dated, Washington, D.C. June 30, 2006

Robert J. Battista , Chairman

Wilma B. Liebman, Member

Peter N. Kirsanow, Member

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[11] The Petitioner made no showing that there was a high rate of success for those taking the LPN licensing exam, which would tend to demonstrate that Ndgiri did *not* have a reasonable expectation of returning to the unit. Such a showing would be part of the Petitioner's burden of proof, as the party seeking to exclude Ndgiri from the unit. See, e.g., *Golden Fan Inn*, 281 NLRB 226, 230 fn. 24 (1986).

That Ndgiri passed the test and became an LPN after the election is immaterial. His eligibility must be determined as of the election date. See, e.g., *Georgia Pacific Corp.*, 201 NLRB 831, 832 (1973).